

BAHARUDIN MAT NOR v. PP
HIGH COURT MALAYA, TAIPING
MUNIANDY KANNYAPPAN JC
[CRIMINAL APPEAL NO: AB-41S-4-06-2019]
30 JUNE 2020

CRIMINAL PROCEDURE: Sentence – Adequacy – Outraging modesty – Outraging modesty of 12-year-old own daughter – Mitigating factors – Exhibition of remorse and old age – Whether deserving a fine sentence – Penal Code s. 354

CRIMINAL LAW: Penal Code – Section 354 – Outraging modesty – Outraging modesty of 12-year-old own daughter – Full trial – Child witness – Credibility of evidence – Whether conviction justified – Sentenced to ten months’ jail – Whether sustainable

EVIDENCE: Witness – Child witness – Outraging modesty – Reliability and credibility of evidence – Evidence Act 1950, ss. 118 & 133A

This was an appeal by the accused against the decision of the learned Magistrate convicting him of an offence under s. 354 of the Penal Code and sentencing him to ten months’ jail and a fine of RM3,500 after a full trial. The facts *inter alia* showed that the victim, who was the main prosecution witness, was a 12-year-old daughter of the accused, that the alleged offence took place when the accused visited his said minor child at a hospital in Taiping, Perak, and that the accused was at the material time aged about 66 years. Be that as it may, it was the accused’s stand that the conviction could not stand as the evidence of the child victim, and that of her twin sister, which together amply implicated him, was incompetent and inadmissible, and that it was legally wrong of the Magistrate to have accepted their evidence. The facts further showed that the learned Judicial Commissioner herein, in or before addressing the issue of sentence, took the liberty to ask the accused whether he was willing to express his remorse by tendering a written apology to his victim daughter and his wife, to which the accused agreed and obliged. The accused, having submitted his written apology in court, the learned Judicial Commissioner then proceeded to deliberate on whether the sentence of ten months’ jail and a fine of RM3,500 as imposed by the learned Magistrate could or could not fairly be sustained by the High Court.

Held (affirming conviction; allowing appeal on sentence):

- (1) Competency and compellability of a witness is a question of law to be decided by the trial judge pursuant to s. 133A read with s. 118 of the Evidence Act 1950 by way of a preliminary hearing on the issue. This said, a child of tender years is a competent witness if he understands the nature of his oath and the duty of speaking the truth, and is able to give rational answers to the questions asked. (para 4)

- A (2) The Magistrate had analysed the competency of both children as witnesses *after* they have taken the oath, although prudence and the law dictate that such preliminary hearing should be conducted *before* they take their oath. The non-compliance, however, is a curable irregularity, as the Magistrate was eventually satisfied and convinced that both children were competent to testify. There was also no prejudice occasioned to the accused as a result of the irregularity. (para 5)
- B
- (3) The children's evidence as well as the corroborative evidence of their mother was properly admitted under s. 133A of Evidence Act 1950, and the ingredients of the offence had been proven beyond reasonable doubt. There was no appealable error committed by the Magistrate in convicting the accused and appellate intervention there against is not justified nor warranted. (para 12)
- C
- (4) The letter of apology is not a form of punishment on the accused. It nonetheless indicates that the accused was remorseful of his folly and contrite over what he did to his daughter. It also demonstrates a desire on his part to change, repent and turn over a new leaf. Indeed, as a two-term State Assemblyman and a man of some position in society, the accused's encounter with the criminal trial itself constitutes a sufferance of the highest degree. Bearing all this in mind, the court is inclined to disturb the sentence passed and have it reduced to a fine sentence of RM5,000. (paras 18-20)
- D
- E

Case(s) referred to:

- Hamsa Kunju v. Regina* [1963] 1 LNS 35 HC (*refd*)
- Mohamad Akhir Bakar lwn. PP* [2019] 3 CLJ 399 HC (*refd*)
- F *PP v. Chan Wai Heng* [2008] 5 CLJ 805 CA (*refd*)
- PP v. Hj Kassim* [1971] 1 LNS 109 FC (*refd*)
- PP v. Pasupathy Kanagasaby* [2001] 2 CLJ 753 CA (*refd*)
- R v. Hayes* [1977] 64 Cr App R 194 (*refd*)
- Stirland v. Director of Public Prosecution* [1944] AC 315 (*refd*)
- Yusaini Mat Adam v. PP* [2000] 1 CLJ 206 HC (*refd*)
- G *Zakariya Musa v. PP* [1984] 1 LNS 93 HC (*refd*)

Legislation referred to:

- Courts of Judicature Act 1964, ss. 50(2), (3), 51(2)
- Criminal Procedure Code, ss. 173(m)(ii), 316(b)(ii), (c)
- Evidence Act 1950, ss. 118, 133A
- H Penal Code, s. 354
- Pensions Act 1980, s. 21(1)
- For the appellant - Wideeya Juliana Mustapha; M/s Faisal Azian & Co*
- For the respondent - Azrul Faiz Abdul Razak; DPP*
- [Editor's note: Appeal from Magistrate's Court; Case No: AB-83JS-4-06-2018]
- I Reported by Wan Sharif Ahmad

JUDGMENT

Muniandy Kannyappan JC:

[1] The accused is 71 years old. He was charged under s. 354 of the Penal Code (PC; Act 574) for outraging modesty of his daughter, aged 12. The incident happened, whilst visiting her at Taiping Hospital. He had put his right hand into her hospital gown and touched her breast, armpit and stomach. There were three instances of outraging of modesty on that day itself. The first time was when he met the victim, second after the victim had her meal and the third when the victim was about to lie down on bed, on the pretext of covering her with a blanket. The incidents took place on 15 April 2015.

[2] A total of four prosecution witnesses and one defence witness testified at the trial. From the onset, the Magistrate was cognizant of the need to be cautious as it was a sexual offence involving a minor. Being that, he had to tread carefully as evidence is usually anchored on the victim's testimony and supporting evidence. That being the case, he proceeded within the norm of the prosecution having to establish a *prima facie* case first at the trial. A preliminary hearing was held, bearing in mind that the witness was a minor, hence adhering to s. 133A of the Evidence Act 1950 (EA; Act 56). In his judgment, he cited several fortifying cases in relation to the applicable provision, like *Yusaini Mat Adam v. PP* [2000] 1 CLJ 206; [1999] 3 MLJ 582; *PP v. Chan Wai Heng* [2008] 5 CLJ 805; *Mohamad Akhir Bakar lwn. PP* [2019] 3 CLJ 399.

[3] One of the issues raised pertaining to reception of child evidence is operation of s. 133A of the EA. Pursuant to the provision, the court has to arrive at an opinion if the child understands the nature of an oath. Hence the issue raised is, if the child's competency as a witness needs to be assessed prior to taking of oath or after.

[4] It is the law that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years etc. (see s. 118 of the EA). Competence and compellability of a witness, including a child witness, is a matter of law which has to be decided by a trial judge. Whenever such an issue arises, there will be a preliminary hearing of that issue. The trial judge will embark on inquiries as are necessary to determine the issue. In criminal cases, like the present, children of "tender years" are competent to give unsworn testimony even though they do not understand the nature of oath, so long as they "are possessed of sufficient intelligence to justify reception of evidence and understand the duty of speaking truth. Children who do understand nature of an oath are competent to give sworn testimony. This is resolved by s. 133A of the EA. The question whether a child is of tender years and has the necessary intelligence will be

- A determined by the trial judge. It is unclear as to what is meant by
“understanding the nature of an oath”. In the case of *R v. Hayes* [1977] 64
Cr App R 194, the English Court of Appeal held that the test is whether the
child has sufficient appreciation of the solemnity of the occasion and the
added responsibility to tell the truth which is involved in taking an oath, over
B and above the duty to tell the truth which is an ordinary duty of normal social
conduct. The fact that the divine sanction of the oath was not recognised by
the child did not necessarily preclude him from giving sworn evidence.
Hence it is the trial judge who determines what type of evidence (sworn or
unsworn) the child should adduce. He arrives at that finding or opinion after
C embarking on a preliminary hearing as alluded to earlier.

- [5] In the present case, the Magistrate has adopted an approach to analyse
the competency of both children (SP1 and SP2) as witnesses, after they have
taken oath. He has justified such an approach in his judgment. However, on
a careful reading of s. 133A of the EA and pursuant to the law as laid down
D above, it is apparent that the court is expected to arrive at an opinion if the
child understands the nature of an oath, which is only possible before a child
takes oath. Thus, if the child is unable to understand and appreciate the effect
of an oath, he or she may proceed to favour unsworn testimony, provided
the court is of the opinion, the child is possessed of sufficient intelligence to
justify reception of evidence and understands the duty of speaking truth.
E Thus, in order of precedence, it would be prudent for the preliminary hearing
to be conducted before the child takes the oath. In the present case, as the
inquiry by the Magistrate took place after oath was taken by both SP1 and
SP2, does it smack on an irregularity or a nullity? Considering the facts and
circumstances of this case, it is stark that both children who have testified
F are in fact competent to do so, pursuant to their evidence after oath.
Moreover, the preliminary hearing conducted by the Magistrate
demonstrates that the children were in fact aware of effect of the oath, when
they informed the court that they know of the effect of not telling the truth
in court when testifying from the witness box. In view of that,
G non-compliance with the said provision is only a curable irregularity as the
Magistrate was convinced that both children were competent to testify and
consequently their testimony was properly received. Moreover, there is no
prejudice suffered by the accused resulting from the irregularity, as his
counsel was still able to cross-examine the children at length.

- H [6] Prior to the incident on 15 April 2015, there was another incident in
a car during the years 2012-2014. At that time, the accused was said to have
outraged the modesty of the twin sister (elder) of the victim. Report of the
said incident was also made to the police in April 2015. In the earlier
incident during the year 2012, the accused claimed that it was done in a
frolicking manner, as his daughter was still a child then. Needless to say,
I these facts are irrelevant to the charge against the accused, which is for
incidents which took place on 15 April 2015. If those incidents are not

proffered as similar fact evidence or evidence of system, it would be prejudicial to the accused person thus rendering it inadmissible under the EA. At this juncture, it would be wise to quote the case of *PP v. Hj Kassim* [1971] 1 LNS 109; [1971] 2 MLJ 115 where His Lordship Ong CJ (Malaya) (as he then was) decided the following:

In all our courts the Evidence Ordinance (as cited then) provides a complete code on the subject. If any fact is sought to be introduced in evidence it must be relevant and admissible under section 5 or one of the other sections following. On the other hand, whatever is logically probative is not necessarily admissible in evidence unless it is so under the Ordinance ... (emphasis added)

[7] The above is a reminder to trial judges to adhere to this principle on admissibility of evidence in a criminal trial, lest not to be faulted for admitting prejudicial and inadmissible evidence. Inadmissible evidence remains so, *albeit* no objections taken on it during the trial by the accused or his counsel. (See the case of *Hamsa Kunju v. Regina* [1963] 1 LNS 35; [1963] 29 MLJ 228; *Stirland v. Director of Public Prosecution* [1944] AC 315 at p. 328). It is apparent that the Magistrate had not taken those evidence into consideration in his speaking judgment. Thus, no substantial miscarriage of justice has occurred.

[8] Another issue was raised with regard to the delay in investigation by police of the crime committed by the accused person. The delay was for about three years. The investigation officer (SP4) testified that he was waiting for instruction from his superior before pursuing the investigation. On this issue, as there is overwhelming evidence against the accused, the alleged delay in the investigation of the crime does not affect the case a jot. Moreover, it is trite law that there is no time limit set for investigation of a crime. Hence, the argument advanced by the defence, does not tilt the case in his favour. The delay too does not prejudice the accused person, as there had been an open court trial in which audible evidence by witnesses were received, whom were cross-examined by the defence counsel. The accused too, had the opportunity to advance his defence, unfettered which is consonant with his right to access to justice as well as fair trial.

[9] In his defence, the accused stated that he had only touched the victim's forehead, neck and chest externally, while reciting a prayer, as she was sick at the hospital. He further contended that it was impossible for him to do what he was alleged to have done as there were other patients and visitors at the ward at the material time.

[10] He had also stated that his ex-wife had instigated the children to trump up the allegations against him. She is said to have acted in vengeance against him. Supposedly, it was done in order to name and shame him. The Magistrate had rejected those explanations by the accused as it has not the effect of raising a reasonable doubt on his guilt.

A [11] At the conclusion of the trial, the accused was found guilty. He was then convicted and sentenced to ten months' imprisonment and with a fine of RM3,500. The sentence of imprisonment is to take effect from the date of conviction. A stay of execution of the said sentence was granted by the Magistrate. Further, he was released on a bail bond of RM7,000 with one surety. The accused then appealed against the conviction and sentence meted out.

C [12] After having perused the record of appeal and heard submissions advanced by counsel for the accused who is the appellant to the appeal and the Deputy Public Prosecutor (DPP) who responded and resisted the appeal, this court concluded that there has been no appealable error committed by the Magistrate. Thus, appellate intervention is not justified as far as the conviction of the accused is concerned. It is iterated that the finding of facts made by the Magistrate is consistent with the body of evidence available and the applicable law to the facts of the case, namely, s. 354 of the PC, EA and Criminal Procedure Code (CPC; Act 593). The finding of guilty and conviction is safe for the following reasons:

- (i) ingredients of the offence under s. 354 of the PC are proven beyond reasonable doubt;
- E (ii) child evidence was properly received under s. 133A of the EA read together with s. 118 of the EA;
- (iii) availability of corroborative evidence from the mother of the victim (SP3) who had witnessed the incident and chided the accused person;
- (iv) defence advanced by the accused does not dislodge the case of the prosecution;
- F (v) no reasonable doubt raised on the evidence proffered by the prosecution which points towards the guilt of the accused, leaving a watertight case against the accused.

G Pursuant to s. 316(b)(ii) of the CPC, this court decides not to alter the finding of guilty and conviction on the accused person. Left, is only the issue on sentence meted out by the Magistrate.

H [13] The Magistrate had deliberated on the sentence to be meted out in a measured manner. He was aware of the severity of the offence, especially so when it involves the daughter of the accused who was a child.

I [14] The circumstance of the accused was given consideration. The accused was quite a prolific personality, having been a State Assemblyman (ADUN) for Alor Pongsu from 1991 until 1999, Chairman for Agensi Anti Dadah Kebangsaan (AADK) Kerian District and had headed many non-governmental organisations (NGOs). But all those were in the past. The

accused is now a 71-year old pensioner. He lives with his wife and supports a child. Crowning it up, he has to contribute an allowance of RM500 monthly as maintenance to the victim and her sister. It is financially straining on him.

[15] The appeal to the Court of Appeal (COA) centred perhaps on the letter of apology. This is gleaned from the notice of appeal signed by the Deputy Public Prosecutor (DPP) which reads as the following:

Selaras peruntukan seksyen 50(2) Akta Mahkamah Kehakiman 1964, persoalan undang-undang adalah seperti berikut:

1. Samada permohonan maaf secara bertulis adalah satu hukuman yang diperuntukkan oleh undang-undang.
2. Samada seksyen 354 Kanun Keseksaan membolehkan Mahkamah memerintahkan permohonan maaf sebagai hukuman.
3. Samada hukuman adalah terlalu rendah (manifestly inadequate).

Rayuan ini adalah terhadap keseluruhan keputusan tersebut ...

[16] At the outset, it is iterated that the Public Prosecutor (PP) is entitled to appeal to COA against a matter which originated at the Magistrate's Court as a matter of right, and in its entirety, unlike the accused person who has to obtain leave from the court of appeal in order to appeal against a decision which originated from the Magistrate's Court. Leave is only granted to the accused if he is able to demonstrate to the Court of Appeal that his appeal is confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision. This is pursuant to s. 50(2) of the Courts of Judicature Act 1964 (Act 91) (CJA). Taking the cue from the decision of the COA in the case of *PP v. Pasupathy Kanagasaby* [2001] 2 CLJ 753; [2001] 2 MLJ 143, to obtain leave in order to enable an accused to file the notice of appeal, he has to satisfy the COA that there are questions of law of the type as specified in s. 50(2) and he must formulate those questions for ease of recognition and determination by the court. Hence, he must first obtain leave before he can file a notice of appeal. As for PP, he is not required to apply for leave (see s. 50(3) of the CJA). The PP needs only to file a notice of appeal and for that purpose, it is expressly provided that no leave is required. He is not required to show to the court that there are questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision. Thus, what is required under the law, is for the notice of appeal to state shortly the substance of the judgment appealed against. (see s. 51(2) of the CJA). The saving grace, in the present appeal is, it is also stated in the notice of appeal, that appeal is against the whole of the decision made by this court.

- A [17] It is emphasised, that this court did not decide that a letter of apology which was directed to be written by the accused to his daughter (victim) and his wife (SP3) who is also the mother of the victim, does not render it to be a sentence or order as envisaged under s. 316(b)(ii) and (c) of the CPC. Thus, if the appeal is directed against the letter of apology issued by the appellant,
- B it is unfounded. It was only a direction made to the accused person so as to justify his contention that he is remorseful of his folly. The fact that the accused is willing to apologise to his daughter and wife, clearly indicates that he is contrite, which is fortified by his letter of apology.
- C [18] Essaying the letter of apology is certainly not a sentence or order and it too does not serve as a punishment. When the apology is written by the accused, it entails him to be responsible for his misdeed to his own child. There is also permanency in written communication. The letter which is in 'black-and-white', is an apology to his child which is fixed, as power of the written word shall not be underrated.
- D [19] This court finds it proper to reduce the sentence meted out by the Magistrate's Court, from a sentence of imprisonment of ten months and a fine of RM3,500 to only a fine of RM5,000. The accused paid the fine. In view of the setting aside of the period of imprisonment and for this court to order only a sentence of fine, there is a reduction of sentence. The reduction is
- E appropriate and justified pursuant to s. 316(b)(ii) of the CPC which renders that on an appeal from a conviction by the accused, this court may without altering the finding of guilty and conviction, reduce the sentence.
- F [20] Thus, the accused has to only pay a fine of RM5,000. It is a sentence according to law, pursuant to s. 173(m)(ii) of the CPC, for the following reasons:
- G (i) The penal provision, s. 354 of the PC caters for an option of a non-custodial sentence. It renders, that on conviction, the accused shall be punished with imprisonment for ten years, or fine, or whipping, or any two of such punishments. The non-custodial sentence allowed by law, is a fine.
- H (ii) The accused shall not at once be sentenced to a period of ten years' imprisonment, as it is dependent on gravity of the offence committed by him. The graver the nature of the offence, the harsher the punishment, likewise, lighter the offence, lighter the punishment would be. This does not mean that the offence committed by him is less serious in nature. But, the sentence meted out has to be proportional to the gravity of offence committed by the accused and his criminal behaviour when committing the offence. Aside from that, the mitigating factors advanced
- I must be considered seriously. In this case, both the aggravating and mitigating factors militate against each other, thus this court has to undertake a balancing exercise, in order to arrive at a just and fair sentence according to law.

- (iii) No one sentence would be a “fit all” in any given circumstance. The circumstance of this case could be different from other cases. The accused person who is at the feet of the court comes with his own set of circumstances. He would have his own personal and family factors, consummating into an extenuating circumstance. The criminality and criminal behaviour of the accused person differ from one case to another too. Hence, a sentence meted out is in fact an individualised sentence. It is this individualised sentence which leads to disparity. Easing back into the present case, the pivotal issue considered by this court before deciding to sentence the accused person to only a fine, is the fact that the accused has vividly demonstrated to this court a desire to change and repent and there are in fact prevailing conditions that would enable him to turn over a new leaf. The primary one being his ripe age of 71 years. Another is the fact that he is willing to apologise to both his daughter and her mother (his wife) on what he had inflicted on his daughter. It is rare for a father to apologise to his own daughter, if not for the fact that he is remorseful of what has happened. It is an active step forward on his part. Although it was done after being directed by this court to do so, it speaks of humility on his part and his willingness to do so. He could have opted not to do so and incur wrath of the law, but he has been wise to choose the better option. His encounter with the criminal trial and appeal process at the courts, will firmly etch in his mind, which is by itself, sufferance of the highest degree. It would have made him much aware of his conduct, which is serious in nature. A
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- (iv) Financial circumstance of the accused has been given its due consideration, when this court metes out the sentence of fine only (see the case of *Zakariya Musa v. PP* [1984] 1 LNS 93; [1985] 2 MLJ 221). It is stark that he is a pensioner who is earning a meagre pension which is utilised to support himself and his families. He is supposed to have more than one wife. SP3 is his third wife. His financial commitment extends to supporting the victim and her family. If he is incarcerated in prison, he will lose financial support for himself, his families and victim and her family. This is so in view of s. 21(1) of the Pensions Act 1980 (Act 227), which renders that: F
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- 21(1) Subject to subsection (2), where any person to whom a pension or other benefit has been granted under this Act is sentenced to death or **to any term of imprisonment by a court**, (emphasis added) such pension or other benefit shall cease forthwith. H
- (2) The pension or other benefit under subsection (1) shall be restored with retrospective effect in the case of a person who after conviction receives a free pardon. I
- (3) ...

A (v) *Albeit* the dominant consideration for sentencing an accused person in
cases of this nature is deterrence, but in view of the prevailing mitigating
factors, it is this court's view that rehabilitation ought to be given due
consideration. It is at this ripe age; the accused would wish to consider
religious pursuits. I have observed that throughout the hearing of the
B appeal, he has been consistently silent and in a state of chanting,
presumably seeking out in prayers. There is so much anguish shown on
his face when doing so.

(vi) In the premise, this court has to adopt a balanced approach. After having
taken into consideration, the ordeal the appellant has underwent to face
C the trial and this appeal and weighing it together with the extenuating
circumstances of the offender, as alluded to above, it would not be
befitting for the accused to be incarcerated in prison. What is paramount
is an appropriate punishment for the appellant to realise his folly. The
appellant is not a ravaging or violent criminal who has to be locked up
D in prison for a period of time in order for him to repent and rehabilitate.
It is sufficient that he is punished for what he did. The ordeal he has
suffered would have the effect of calming his impulse so as not to be
unduly impulsive in his behaviour. In the premise, a non-custodial
sentence of fine is definitely befitting and by which public interest is also
E served.

Conviction affirmed. Sentence varied and reduced to fine only, of RM5,000.

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